Painters Union Local No. 786 *and* Pittsburgh Corning Corporation and American Flint Glass Workers Union, Local No. 1004, AFL-CIO. Case 17-CD-287

June 22, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Pittsburgh Corning Corporation, herein called the Employer, alleging that Painters Union Local No. 786, herein called the Painters, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees it represents rather than to employees represented by American Flint Glass Workers Union, Local No. 1004, AFL-CIO, herein called the Glass Workers.

Pursuant to notice, a hearing was held before Hearing Officer Deborah A. Ford on March 5, 1982. Neither the Painters nor the Glass Workers appeared at the hearing. The Employer appeared and was afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free of prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The Employer admits, and we find, that the Employer is a Pennsylvania corporation, and that at its Sedalia, Missouri, facility, the only facility involved herein, the Employer is engaged in the manufacture of cellular glass. During 1981, the Employer shipped from that facility goods valued in excess of $1 million to customers located outside the State of Missouri. The Employer admits, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The Employer concedes, and we find, that the Glass Workers[1] and the Painters[2] are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

In January 1982,[3] the Employer was engaged in a renovation project which included the modernization of its cellular glass manufacturing furnaces at its Sedalia plant. The project involved converting seven furnaces into five longer furnaces. As a result of the modifications, some metal surfaces were newly exposed and some new metal was incorporated into the units. This metal requires painting for protection and appearance.

The construction work on the furnaces and lehrs[4] was subcontracted to Bigelow Liptack, a Michigan firm. The painting necessitated by the construction was not subcontracted; it was assigned to the Employer's employees who are represented by the Glass Workers.

The employees represented by the Glass Workers began painting the modified furnaces and lehrs on or about January 19. On January 27, Harley Davis, business agent for the Painters, contacted the Employer's works manager, Wayne Carrol. Davis protested that his members were not getting their fair share of painting work from the furnace modernization project, and that he believed the Employer should either hire a contractor who hired union painters or hire union painters directly to paint the furnaces and lehrs. Carrol told Davis that the painting work had not been subcontracted but rather had been assigned to the Employer's employees represented by the Glass Workers. Carrol declined to change the assignment.

On or about the first of February, Davis again met with Carrol and made the same claim for the work for his members. Carrol repeated the Employer's position.

On or about February 3, Carrol asked Davis to come to the Employer's plant to discuss the issue. Carrol, Davis, and the Employer's personnel manager, Bob Moore, inspected the painting work in progress and the future work to be done. Davis re-

[1] This finding is based on, in addition to the Employer's concession, the collective-bargaining agreement between the American Flint Glass Workers Union and the Employer, admitted into evidence at the hearing, and the terms and provisions of that agreement.

[2] We base this finding on the testimony of the Employer's witness, the record as a whole including the Employer's concession, and the absence of any evidence to the contrary.

[3] All dates refer to 1982 unless otherwise indicated

[4] A lehr is a type of furnace.

peated that this work should be assigned to his people, and according to Carrol, stated that "he [Davis] had to do what he had to do." Although Carrol asked for clarification of this remark, Davis declined to be more specific. On February 5, Davis was again in Carrol's office. The prior conversations were essentially repeated.

On the morning of February 9, the Painters set up a picket line at the Employer's plant. Carrol testified that the picket signs proclaimed that Pittsburgh Corning employees received substandard wages and fringe benefits and that the dispute was with Pittsburgh Corning only. The pickets continued on February 10 and 11. On February 11, Carrol called Davis and asked him to discontinue the picketing. Davis stated that he still wanted the work of painting the furnaces and lehrs. He asked Carrol if the work was being done that day. When Carrol replied that it was not, Davis asked that Carrol inform him when it began again and Carrol agreed to do so. This was the final day of picketing.

B. *The Work in Dispute*

In accordance with the description of the disputed work as set forth in the notice of hearing, we find that the dispute before us is confined to the painting of modified lehrs and furnaces within the cellular glass manufacturing area of the Pittsburgh Corning Corporation's Sedalia, Missouri, plant.

The Employer contends that the work in dispute is all maintenance painting work normally and customarily assigned by it to its employees who are represented by the Glass Workers, and that the Board's award should encompass all such maintenance painting work. While admitting that the work described in the notice of hearing gave rise to the present dispute, the Employer asserts that this work is merely one type of maintenance painting customarily done by its employees. The Employer points to testimony by its works manager which, it contends, suggests that the Painters has an interest in securing all types of maintenance painting. To support its request for a broad award, the Employer also relies on the fact that the Painters has not made a disclaimer of any kind.

We are not persuaded by the Employer's argument. Although Carrol testified that, in his conversations with Davis, Davis ". . . seemed to be talking about painting work relating to modernization of the facility," which includes work other than the furnaces and lehrs, Carrol also stated that Davis was "clearly most concerned" with the furnaces and lehrs. Significantly, Carrol testified that when other maintenance painting work was done in the past, to Carrol's knowledge, the Painters never questioned the right of employees represented by the Glass Workers to do that work. For these reasons, we find that the work in dispute is properly described in the notice of hearing.[5]

C. *The Contentions of the Parties*

The Employer contends that a jurisdictional dispute exists and that the Painters violated Section 8(b)(4)(D) of the Act by demanding that painting work be assigned to its members rather than to members of the Glass Workers, and by picketing the Employer's facility to force the Employer to assign the work to its members. The Employer further contends that the work in dispute should be assigned to its own employees who are represented by the Glass Workers, that the dispute is properly before the Board, and that such an assignment is consistent with its collective-bargaining agreement with the Glass Workers, the Employer's past practice and continued preference, the industry practice, job impact, and relative skills. The Employer also contends that the award requires a broad order awarding all maintenance painting work done at the Sedalia plant to its employees represented by the Glass Workers.

Neither the Painters nor the Glass Workers has taken any position on any issue.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is uncontested that, on four occasions, the Painters business agent, Harley Davis, protested to the Employer about the assignment of the furnace and lehr painting to employees represented by the Glass Workers, and sought to have the work assigned to his members. When the Employer refused to change the assignment, Davis, according to Carrol, stated that ". . . he [Davis] had to do what he had to do." A short time later, on February 9, the Painters picketed the Employer's facility. The picket signs indicated that the Painters was merely protesting allegedly substandard wages and benefits received by the Employer's employees. However, the timing of the picketing and the content of Davis' conversations with the Employer's works

[5] There is no proof that all parties had notice of, and full opportunity to litigate, the broader work dispute claim made by the Employer. See *Truckdrivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (American Bank Note Company)*, 241 NLRB 811 (1979).

manager demonstrates that the true intent of the picketing was to coerce the Employer into assigning the painting to members of the Painters.

On the basis of the foregoing and the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various relevant factors.[6] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[7]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Employer has a current collective-bargaining agreement with the Glass Workers. Although the agreement does not specifically define the work it covers, it does recognize the Glass Workers as the sole representative of the Employer's production and maintenance employees at the Sedalia plant. On the other hand, the Employer has no agreement with the Painters. Accordingly, this factor favors awarding the disputed work to employees represented by the Glass Workers.

2. Employer assignment and preference

The Employer has assigned the work in dispute to its employees who are represented by the Glass Workers and has manifested a decided preference to continue that assignment. This factor, while not determinative, favors an award of the disputed work to employees represented by the Glass Workers.

3. Employer and industry practice

Wayne Carrol, works manager for the Employer at its Sedalia plant, testified that the disputed work is the type of work the Employer has historically assigned to its own employees represented by the Glass Workers. Carrol also testified, based on his career experience, that it was industry practice to assign this type of work to employees of the company, who are normally production and maintenance unit employees. These factors favor an award of the disputed work to employees represented by the Glass Workers.

4. Job impact

Should the disputed work be assigned to employees represented by the Painters, the Employer would be required to lay off part of its existing work force which presently performs the disputed work. This is a factor favoring assignment of the disputed work to employees represented by the Glass Workers.

5. Relative skills

The Employer's works manager testified that the employees of the Employer who are represented by the Glass Workers have the requisite skills to perform the work in dispute. There was no direct evidence of the skills possessed by members of the Painters. There also was no indication that sophisticated skills or training are required to perform the task. Since there is insufficient evidence to indicate that the assignment of the work to either group would result in greater safety or that the work would be performed in anything less than a satisfactory manner, we find that this factor favors neither group.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the employees who are represented by the Glass Workers are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's assignment and preference, the Employer's and the industry's practice, the collective-bargaining agreement, and job impact. In making this determination, we are awarding the work in question to employees who are represented by the Glass Workers, but not to that Union or its members.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Pittsburgh Corning Corporation who are represented by American Flint Glass Workers Union, Local No. 1004, AFL-CIO, are entitled to perform the work of painting the modified lehrs and furnaces within the cellular glass

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[6] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[7] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

manufacturing area of the Pittsburgh Corning Corporation's Sedalia, Missouri, plant.

2. Painters Union Local No. 786 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Pittsburgh Corning Corporation to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Painters Union Local No. 786 shall notify the Regional Director for Region 17, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.